Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

MAYLON D. BROWDER,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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53pp

QUESTION PRESENTED

Whether all defendants must join in a removal petition within thirty days after any defendant received papers from which it may be determined that a case is removable to federal court.

PARTIES BELOW

In addition to the parties to this Petition, the following other parties appeared in the district court: Blue Cross, Intervenor/Plaintiff; Tony R. Pierce, Defendant; State Farm Mutual Automobile Insurance Company, Defendant. Petitioner shows that Respondent General Motors Corporation lists hundreds of affiliates, but Petitioner does not know which ones are parent companies or nonwholly owned subsidiaries required to be disclosed in accordance with this Court's Rule 29.6, and must rely upon General Motors to make those disclosures in its Response.

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14A C.Wright, A.Miller & E.Cooper, *Federal Practice & Federal Jurisdiction 2d*, § 3732 at 531-32 (1985) 7

OPINIONS BELOW

The orders and dispositions below are not reported. They appear in the Appendix, as follows: the order of the United States District Court for the Middle District of Alabama denying Petitioner's motion to remand to the state courts of Alabama after removal (App., *infra*, 8a-9a); that court's denial of reconsideration (stamped order appears on the face of the motion, at App., *infra*, 10a); the order of the trial court denying Petitioner's "Renewed Motion for Remand . . . " (App., *infra*, 12a-17a); the simultaneous order of the trial court severing a non-diverse defendant and remanding to the Alabama state courts for decision whether Petitioner had settled with him (App., *infra*, 18a-20a); the decision of the United States Court of Appeals for the Eleventh Circuit affirming the trial court's disposition of this case (App., *infra*, 1a); and the order of the United States Court of Appeals for the Eleventh Circuit denying rehearing and rehearing en banc (App., *infra*, 21a).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion on appeal on October 23, 1998. (App., *infra*, 1a) That court denied a motion to reconsider on December 29, 1998. (App., *infra*, 21a) This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

28 U.S.C. § 1446(b) (App., *infra*, 22a); Fed.R.Civ.P. 8(e)(2) (App., *infra*, 23a).

STATEMENT OF THE CASE

A. Petitioner's Allegations and Claims for Relief.

Petitioner Mahlon Daniel Browder, Jr., a young man in his twenties, was permanently and severely disabled as a result of the motor vehicle accident at issue in this litigation. He was a passenger in a 1994 Chevrolet K-5 Blazer designed and manufactured by Respondent General Motors Corporation ("GMC"). The weather was clear and dry, and the highway was an unlit rural two-lane asphalt road. As the driver rounded a curve, the Blazer ran off the right shoulder. The driver "snatched it back" but "lost control." Browder was ejected, to be found 10-20 yards away. His resulting severe injuries include permanent paraplegia. Petitioner's relevant claims against GMC assert its design and manufacture of an unreasonably dangerous product.

B. Proceedings Below and Petitioner's Presentation of a Federal Question.

Petitioner sued Tony Pierce, the driver, and GMC in tort on May 11, 1995, in the Civil Court of Covington County, Alabama. GMC removed to the United States District Court for the Middle District of Alabama on May 10, 1996. On May 16, 1996, Petitioner moved to remand to the state courts. (App., *infra*, 3a) The motion was denied

initially on June 28, 1996 (App., *infra,* 8a-9a) and again August 19, 1996, after motion for reconsideration. (App., *infra,* 10a) On May 20, 1997, in a Memorandum Opinion and Order (App., *infra,* 12a), the district court denied Petitioner's Renewed Motion For Remand; and on that same date in a companion Order (App., *infra,* 18a), severed and remanded to the state courts of Alabama an issue whether Petitioner had settled with the non-diverse co-defendant. The federal district court disposed of the case by entry of summary judgment against Petitioner on January 27, 1998.

Petitioner appealed timely to the United States Court of Appeals for the Eleventh Circuit, which had appellate jurisdiction pursuant to 28 U.S.C. § 1291. Petitioner renewed his arguments against removal and in favor of remand, in both his initial brief in that court (App., *infra,* 24a-34a) and his reply brief (App., *infra,* 35a-37a). The Court of Appeals affirmed (App., *infra,* 1a) and on December 29, 1998, denied rehearing and rehearing en banc. (App., *infra,* 21a)

C. Additional Facts Necessary to the Certiorari Issue.

Tony Pierce is a resident of Alabama. Former Defendant State Farm and GMC are citizens of other states.

On April 3, 1996, more than 30 days before removal, counsel for Tony Pierce sent State Farm a copy of his letter addressed to counsel for Petitioner, accepting Petitioner's earlier offer to settle for Pierce's policy limits. Its text in full is a follows:

> We have policy limits of $20,000.00 which we desire to pay on behalf of our insured, Tony R. Pierce.
>
> We have been contacted by Blue Cross Blue Shield and have been advised that their subrogation interest stands at $93,642.81. I do not have information, at this time, regarding hospital liens.
>
> I assume that you have worked out an agreement with Blue Cross Blue Shield in this matter and with the hospitals. Please provide us with proper assurance that our payment of this claim will not be subject to hospital liens or claims by Blue Cross Blue Shield.
>
> Thank you.

(R1-1, Exh. B)

State Farm failed to remove within 30 days of receipt of the April 3, 1996 letter. Furthermore, GMC's May 10 removal petition to the federal district court was not within 30 days after State Farm had received notice of grounds for removal.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE SPLIT IN APPLYING THE STATUTORY REMOVAL DEADLINE TO MULTIPLE DEFENDANTS.

This Court should grant review to resolve important practical questions of how to apply the federal removal statutes, questions which have split the lower courts. Those issues concern how to apply 28 U.S.C. § 1446(b)

and its 30-day removal time limit to multiple defendants when the statute does not address cases with multiple defendants. Specifically, the lower courts have split on the following issues: first, whether the so-called "unanimity rule" requires that all defendants join in removal within thirty days of removal rights in the first-served defendant,[1] on pain of loss of all removal rights; and second, whether the first-served defendant's failure to exercise its removal rights within thirty days will bar all defendants thereafter from removing. These issues have confounded the lower courts at least since 1992, and cry out for this Court's direction and guidance.

The starting point is this Court's decision in *Chicago, R.I. & P.R. Co.*, 178 U.S. 245 (1900), that all defendants must seek removal in order to perfect a removal petition. This is the so-called "unanimity rule." It follows from this rule that all defendants must exercise their removal rights timely. *Tri-Cities Newspapers, Inc. v. Tri-Cities Printing, Local 349*, 427 F.2d 325 (5th Cir. 1970). This Court has never addressed the issue of how to apply section 1446(b)'s thirty-day deadline to multiple defendants who are served at different times.

"By far the majority of courts that have dealt with the timeliness issue have adopted the single-date-of-removal rule, with Section 1446(b)'s 30-day time clock beginning

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[1] Petitioner uses the term "first-served" as a useful but potentially somewhat misleading shorthand. In fact, 28 U.S.C. § 1446(b) contemplates removal rights arising from developments in the case after service of the complaint, and imposes a similar 30-day removal deadline. This case involves removal well after the complaint was served.

to run with service on the *first* defendant entitled to remove." *Scialo v. Scala Pack. Co.*, 821 F.Supp. 1276, 1277 (N.D.Ill.1993) (italics in the original) (citations omitted). Yet until 1992, apparently only the Fifth Circuit among all the courts of appeals had addressed the implications of this rule.

Building on this rule, the Fifth Circuit has found two corollaries. First, all defendants whenever served are barred from removing if the first-served defendant(s) fail to exercise their removal rights within 30 days. "If the first served defendant abstains from seeking removal or does not effect a timely removal, subsequently served defendants cannot remove . . . due to the rule of unanimity among defendants which is required for removal." *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986) (citations omitted).

Second, "all served defendants must join in the petition no later than thirty days from the day on which the first defendant was served. This rule . . . promotes unanimity among the defendants without placing undue hardships on subsequently served defendants." *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254, 1263 (5th Cir. 1988) (citations omitted). The Fifth Circuit also tied its ruling back to the purposes for and assumptions underlying removal generally: "Moreover, by restricting removal to instances in which the statute clearly permits it, the rule is consistent with the trend to limit removal jurisdiction and the axiom that the removal statutes are to be strictly construed against removal." *Id.*, n.19 (citing *Brown v. Demco, supra*).

Even as it required unanimous petition within 30 days, the Fifth Circuit noted: "The general rule has been criticized as unfair. [Critics] point out that it deprives defendants served after the thirty-day period 'of the opportunity to persuade the first defendant to join in the removal petition.' " *Brown v. Demco*, 792 F.2d at 482 (citation omitted).

By 1992, this timing rule had generated a lively academic and practical debate. The two leading commentators on the federal rules disagreed as to the existence of textual support for, and the wisdom of, the first-served defendant rule. Compare 1A J. Moore, *Federal Practice*, ¶ 0.168 [3.5-5] at 586-87 (2d ed. 1996) (finding rule supported by statute); with 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Federal Jurisdiction 2d*, § 3732 at 531-32 (1985) (rule not required by statute and rejected on policy grounds, as unfair to later-served defendants).

In 1992, the Fourth Circuit weighed into the debate, explicitly differing with the Fifth Circuit in *Getty Oil* as to the issue posed by the instant case. "While the first-served defendant clearly must petition for removal within thirty days, section 1446(b) does not imply in any way that late served defendants have less than thirty days in which to act." *McKinney v. Board of Trustees*, 955 F.2d 924, 926 (4th Cir. 1992). That court found that the first-served defendant rule did violence to the statute: "[I]t is [not] appropriate for a court to add a word . . . by in effect inserting 'first' before 'defendant.' " *Id.* at 927.

That court challenged the Fifth Circuit's premise that the policies underlying the removal statutes cut in favor of the rule. "[B]y providing for removal in the first place,

Congress seems to believe that the defendant's right to remove a case that could be heard in federal court is at least as important as the plaintiff's right to the forum of his choice." *Id.*

Finally, the court suggested two other policy reasons to support its rejection of the rule. "Although we certainly do not suggest that the plaintiffs here were consciously attempting to prevent removal, the rule they urge would allow such tactics." Moreover, the court relied upon then newly-amended Fed.R.Civ.P. 11 and its sanctions for unwarranted filings as an indication that Congress would not want to force defendants into making quick and uninformed decisions to attempt removal. *Id.* at 928.

McKinney has sparked lively debate about both the existence and the advisability of the first-served defendant rule. *See, e.g., Faulk v. Superior Inds. Int'l, Inc.*, 851 F.Supp. 457 (M.D.Fla.1994) (in dictum, disagreeing with *McKinney* as applied to cases like *Getty Oil* and the case at bar).

The liveliest debate about *McKinney's* implications has come in those cases involving the first-served defendant's failure to answer during the 30 days after it is served, as in *Brown v. Demco*. Several cases apply *McKinney* to reject the first-served defendant rule. "[T]here is nothing in the language or the legislative history of section 1446(b) which supports the notion that the decision to remove rests exclusively with the first served defendant." *Ford v. New United Motors Mfg., Inc.*, 857 F.Supp. 707 (N.D.Cal.1994). "While a first-served defendant having failed to initiate a removal within thirty days of

service may have waived the right to do so, there is no compelling reason for precluding a first-served defendant from joining in or consenting to a later-served defendant's removal." *Freeman v. Bechtel,* 936 F.Supp. 320, 326 (M.D.N.C.1996). *See also Garside v. Osco Drug, Inc.,* 702 F.Supp. 19, 21 (D.Mass.1988) ("Moore does not give adequate weight to the interplay that often occurs in multiparty litigation. In practice, removal is often as much a matter of trial strategy as . . . of forum selection."); *cf. Eltman v. Pioneer Communs. of Amer., Inc.,* 151 F.R.D. 311, 317 (N.D.Ill.1993) ("even if barring removal by a later-served defendant is justified in certain circumstances, it is unjustified and inequitable when the later-served defendant is not named until the initial thirty day period has lapsed.").

The majority of the lower court decisions continue to preclude removal where the first-served defendant fails to seek removal within 30 days, even after *McKinney. McShares, Inc. v. Barry,* 979 F.Supp. 1338 (D.Kan.1997); *Higgins v. Kentucky Fried Chicken,* 953 F.Supp. 266 (W.D.Wis.1997); *Bazilla v. Belva Coal Co.,* 939 F.Supp. 476 (S.D.W.Va.1996); *Kuhn v. Brunswick Corp.,* 871 F.Supp. 1444 (N.D.Ga.1994); *Beasley v. Goodyear Tire & Rubber Co.,* 835 F.Supp. 269 (D.S.C.1993); *Scialo v. Scala Pack. Co., supra; Martin Pet Prods. (U.S.) v. Lawrence,* 814 F.Supp. 56 (D.Kan.1993). Yet clearly the lower courts are badly split as to what approach to take in multi-defendant removal cases where service occurs at different times.

This Court should grant certiorari to decide whether all defendants must join in seeking removal within 30 days of notice upon any defendant; and whether that result is unfair to late-noticed defendants.

II. THE FACTS ARE APPROPRIATE FOR REVIEW ON CERTIORARI.

GMC doubtless will contend that this case is factually inappropriate for applying the first-served defendant rule. Petitioner will show otherwise.

First, GMC has argued that Petitioner waived his right to protest by not moving to remand within 30 days on grounds of untimely removal. *See, e.g., Harris v. Edward Hyman Co.*, 664 F.2d 943, 944 (5th Cir. 1981). But Petitioner filed his motion to remand within a week of removal. The motion asserted as one ground that "Defendants have waived the right of removal by not removing within thirty (30) days as required by 28 U.S.C. § 1446(b)." (App., *infra*, 3a)

Respondent further contends that Petitioner somehow waived this contention by arguing principally (and inconsistently) that the case was not removable for lack of diversity, because Browder and Pierce had not yet settled before removal.[2] Fed.R.Civ.P. 8(e)(2) (*See* App., *infra*, 23a), however, permitted Petitioner to stake out inconsistent legal positions as to the effect of the parties' correspondence.

Finally, GMC asserts that the letter of April 3, 1996 did not effect settlement with Pierce, thus did not delete

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[2] The district court eventually remanded the issue whether the parties had settled to the Alabama courts, which resolved that the exchange of letters between counsel for Browder and Pierce constituted a settlement. The Alabama courts were not asked to decide and did not decide precisely when settlement was reached.

from the case the remaining nondiverse defendant, therefore did not constitute the "other paper" triggering the 28 U.S.C. § 1446(b) thirty-day removal period. But the April 3 letter read in its entirety, and in light of Petitioner's prior offer to settle for policy limits, effected settlement and triggered the required removal period.

CONCLUSION

The Court should grant certiorari to review whether a removal petition is untimely unless all defendants join within 30 days of effective notice to any of them.

This 29th day of March, 1999.

Respectfully submitted,

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Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6155
Non-Argument Calendar

D.C. Docket No. CV-96-D-789-N

MAYLON D. BROWDER,

Plaintiff-Appellant,

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

(October 23, 1998)

Before TJOFLAT, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

(Removed from the Circuit Court for Covington County, Alabama; CV-95-113)

MAHLON DANIEL BROWDER, JR.	*	
Plaintiff,	*	Civil Action No. 96-D789-N
vs.	*	
TONY R. PIERCE; GENERAL MOTORS CORPORATION; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; and JOHN DOES 1 through 30, whether individuals or entities, whose true names will be substituted by amendment when ascertained,	*	
Defendants.	*	

PLAINTIFF'S MOTION TO REMAND

Plaintiff moves the Court to Remand this action to the Circuit Court in and for Covington County, Alabama. As grounds therefor Plaintiff would show the Court that this action is not removable:

1. No federal question exists to provide jurisdiction under 28 U.S.C. § 1331.

2. Even if a federal question existed, Defendants have waived the right of removal by not removing within thirty (30) days as required by 28 U.S.C. § 1446(b).

3. There is not complete diversity of citizenship because both Plaintiff Browder and Defendant Pierce are citizens of the State of Alabama. Therefore, no removal jurisdiction is provided by 28 U.S.C. § 1332.

4. Even if Defendant Pierce were to be dismissed at some future time, removal would not be possible because the complaint in this action was filed on May 11, 1995 and more than one year has elapsed since the commencement of this action. "[A] case may not be removed on the basis of" diversity of citizenship "more than 1 year after commencement of the action." 28 U.S.C. § 1446(b).

5. Defendants have pointed to a letter of May 1, 1996, by Plaintiff's counsel that gives evidence of ongoing settlement negotiations with Defendant Pierce. Although it is true that informal notice such as a letter can begin the running of the time within which an action must be removed, the letter upon which the removing Defendants rely is not sufficient as a matter of Alabama law to settle with Defendant Pierce, and therefore, the action is not removable.

In *Vasquez v. Alto Bonito Gravel Plant Corporation, et al.*, 56 F.3d 689 (5th Cir. 1995), the court stated:

> We hold that a case that was not originally removable under our diversity jurisdiction because of the presence of a nondiverse defendant may be removed *only after it is clear under applicable state law* that the nondiverse defendant has been taken out of the case, leaving a controversy wholly between the plaintiff and the diverse defendant.

Id. at 694. In the present case, it is not clear that Defendant Pierce has been taken out of the case. In fact, the opposite is true; it is clear under Alabama law that Defendant Pierce remains a party to the suit over a year after its commencement. The removing Defendants have cited Code of Alabama, 1975, § 34-3-21 for the proposition that an attorney may bind his client to a settlement. However, such a settlement must be construed according to ordinary contract principles. The letter which the Defendants cite is devoid of any enforceable contract terms. Consideration for the purported settlement is not specified. The fact that releases are to be sent indicates that the terms have not been finalized. The letter uses the future tense in stating that "we *will resolve* this matter with regard to your client." Letter of May 1, 1996, to Todd Derrick (emphasis added). Although the phrase "since this settlement is concluded" might indicate that some sort of oral understanding had been reached, the very next sentence says "I suppose I will be able to do that voluntarily once the settlement is done," thus indicating that the settlement was not, in fact, done. *Id.* Even construing the letter in the light most favorable to the removing Defendants, the letter is ambiguous. *Cf. Vasquez v. Alto Bonito*, 56 F.3d at 693 n.4 (distinguishing between settlement and agreement to settle).

Furthermore, even if one were to consider the letter evidence that there had been an oral agreement by Plaintiff's counsel, such an agreement is not enforceable. Code of Alabama, 1975, § 34-3-21 only gives an attorney authority to bind his client to an agreement "in writing, or by an entry to be made on the minutes of the court." *See e.g., Spurlock v. Pioneer Financial Services, Inc.*, 808 F.

Supp. 782, 783 (M.D. Ala. 1992) (DeMent, District Judge) (comparing § 31-3-21 and Rule 47 of the Alabama Rules of Appellate Procedure and noting in an Alabama Supreme Court case that "there was no written agreement, either signed or unsigned, so the oral agreement would have been invalid under either rule").

6. The cases that the removing Defendants cite are all distinguishable from the present case. In *Lesher v. Andreozzi*, 647 F. Supp. 920 (M.D. Pa. 1986), the Plaintiff's attorney announced the intention not to proceed against the non-diverse Defendant in open court by asking the jury not to return a verdict against that defendant. In *Hessler v. Armstrong World Industries, Inc.*, 684 F. Supp. 393, 394 (D. Del. 1988), not only had the settlement been disclosed by "a letter [that] was mailed . . . to all defense counsel," but the settlement had also been announced to the court with counsel for all parties present. That is quite different from the situation in the present case where a letter indicating that settlement negotiations with the nondiverse Defendant were entering the final stages was sent to that Defendant's counsel alone.

7. Nevertheless, the fact remains that there was no settlement enforceable under Alabama law. In a similar context, the Fifth Circuit Court of Appeals found that a written agreement did not provide for removal jurisdiction because it was not enforceable under state law.

> Whatever agreement existed between the Vasquezes and Alto Bonito was inchoate in the sense that the agreement was not legally binding and either party could have unilaterally revoked the agreement and proceeded to litigate its respective claims. In short, there was simply

> no agreement between the parties and on the record that had the effect of actually removing Alto Bonito as a party from the case. The controversy thus was not "wholly between the plaintiffs and the non-resident defendant," and consequently not removable.

Vasquez v. Alto Bonito, 56 F.3d at 694 (citation omitted). Similarly in the present case, even if there were an agreement between Plaintiff Browder and Defendant Pierce, it was not legally binding and the action is consequently not removable.

WHEREFORE, since this action is not removable, Plaintiff respectfully requests the Court to remand this action to the Circuit Court of Covington County, Alabama.

THE TIPLER LAW OFFICES
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/s/ James Harvey Tipler
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MAHLON DANIEL BROWDER, JR.	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION
TONY R. PIERCE, GENERAL MOTORS CORP., and STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,	)	NO. 96-D-789-N
Defendants.	)	

ORDER

Before the court is the plaintiff's motion filed May 16, 1996, to remand this case to the Circuit Court of Covington County, Alabama. After careful study of all the briefs and evidence in support of and in opposition to the motion to remand, the court finds that removal is proper pursuant to 28 U.S.C. §§ 1332 and 1441.[1] Accordingly, it is CONSIDERED and ORDERED that the plaintiff's motion to remand be and the same is hereby DENIED.

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[1] Section 1441 states in part that " . . . any civil action brought in a State court of which district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending . . . " 28 U.S.C. § 1441(a). Pursuant to 28 U.S.C. § 1332(a), a district court has original jurisdiction over all cases where citizens of different states are involved and the amount in controversy exceeds $50,000, exclusive of interest and costs.

DONE this 28th day of June, 1996.

/s/ Ira DeMent
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MAHLON DANIEL BROWDER, JR.

Plaintiff

vs.

TONY R. PIERCE; GENERAL MOTORS CORPORATION; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; and JOHN DOES 1 through 30, whether individuals or entities, whose true names will be substituted by amendment when ascertained,

Defendants.

Civil Action No. 96-D-789-N

MOTION DENIED

this 19th day of August, 1996

/s/ Ira DeMent
UNITED STATES DISTRICT JUDGE

PLAINTIFF'S MOTION TO RECONSIDER

Plaintiff, Mahlon Daniel Browder, Jr., requests that this Court reconsider its Order dated June 28, 1996, denying Plaintiff's Motion to Remand, for the following reasons:

1. Attached hereto as Exhibit "A" are letters dated June 26, July 3, July 19, and July 26 between Counsel for Plaintiff and Counsel for the non-diverse Defendant, Tony R. Pierce.

2. It is Black Letter Law that when terms of a settlement are not finalized, there is no meeting of the minds, and, therefore, there is no settlement.

3. As the attachments to this Motion indicate, the settlement was still being negotiated after June 11, 1996, and is still not final.

4. While Counsel have attempted to resolve the issues between them, settlement has not occurred. Therefore, the one-year period which expired on June 11, 1996 prevents removal of this case to the United States District Court, and requires remand.

Plaintiff, therefore, requests that this Court reconsider its ruling and Order this case remanded to the Circuit Court of Covington County, Alabama.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MAHLON DANIEL BROWDER, JR.	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION
TONY R. PIERCE, GENERAL MOTORS CORP., and STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,	)	NO. 96-D-789-N
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Before the court is the Plaintiff's "Renewed Motion For Remand on Completely New and Independent Grounds; and Request for Hearing" ("New Motion") filed March 31, 1997. Plaintiff filed a supplemental memorandum of law in connection with the New Motion on April 2, 1997. Defendant General Motors ("GM") filed a response to the New Motion on April 9, 1997. After careful study of all the briefs and evidence in support of and in opposition to the New Motion, the court finds that the removal of this action is proper pursuant to 28 U.S.C. §§ 1332 and 1441[1] and that the New Motion is due to be denied.

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[1] Section 1441 states in part that "any civil action brought in a State court of which district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is

The Plaintiff filed his initial motion to remand ("Initial Motion") on May 16, 1996. On June 28, 1996, the court denied the Plaintiff's Initial Motion. On August 19, 1996, the court also denied the Plaintiff's motion for reconsideration. As part of his January 28, 1997, response to Defendant Tony R. Pierce's ("Pierce") motion for entry of judgment, Plaintiff renewed his request for remand ("Renewed Remand Request"). To the extent the Plaintiff's Renewed Remand Request constitutes a motion to remand the court finds that it is due to be denied just as the initial motion was denied.[2] The court finds that the Renewed Remand Request raises issues previously identified and resolved during the disposition of the Plaintiff's Initial Motion.

According to the Plaintiff, his New Motion rests on "new and independent grounds." The Plaintiff now contends that Defendants State Farm and GM are residents of

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pending" 28 U.S.C. § 1441(a). Pursuant to 28 U.S.C. § 1332(a), a district court has original jurisdiction over all cases where citizens of different states are involved and the amount in controversy exceeds $50,000, exclusive of interest and costs. The court notes that the Federal Courts Improvement Act of 1996 amended Title 28, U.S.C. § 1332 to raise the jurisdictional amount from $50,000 to $75,000. This change became effective with actions filed on or after January 17, 1997.

[2] In his initial motion to remand the Plaintiff claimed that Pierce, an Alabama resident, was still a party to this action thereby destroying diversity. Defendants argued that Plaintiff settled with Pierce allowing removal of this action under the provisions of 28 U.S.C. § 1447. The court found for the Defendants in its June 28, 1996, order denying the Plaintiff's Initial Motion. The Renewed Remand Request argues that Plaintiff's counsel was not authorized to settle the matter due to a lack of authorization from his client.

Alabama for purposes of the determination of diversity. Therefore, according to the Plaintiff, the court lacks jurisdiction over this matter. Plaintiff argues that under the "direct action" provision, State Farm "must be deemed a citizen of Alabama for diversity purposes pursuant to 28 U.S.C. § 1332(c)(1), rendering this action non-removable under 28 U.S.C. § 1441(b)." He also argues that both State Farm and GM are "sufficiently 'localized' in Alabama as to serve the primary purpose of diversity jurisdiction: avoiding any possible bias favoring the party from the state in which the state court proceeding is brought." Put differently, Plaintiff's second argument claims that the principles of diversity jurisdiction will not be offended by deeming State Farm and GM citizens of Alabama.

GM argues that 28 U.S.C. § 1332(c)(1) has no impact on this action because the Plaintiff's action against State Farm is not a "direct action." GM contends that actions in which the insured sues his insurer seeking underinsured/uninsured motorist benefits is not a direct action as defined by 1332(c)(1). GM also argues that Plaintiff's supplemental brief acknowledges that his action against State Farm is not a direct action and concedes defeat on this portion of his New Motion. Finally, GM dismisses as "baseless" Plaintiff's argument that State Farm and GM are sufficiently localized in Alabama so that they are Alabama citizens for jurisdictional determination.

The court agrees with GM and finds Plaintiff's "sufficiently localized" argument to be baseless. Corporations are deemed to be citizens of the state in which they were incorporated and where they have their principal place of business. 28 U.S.C. § 1332(c)(1). The Plaintiff does not contend that GM or State Farm is deemed an Alabama

citizen under either of these methods; instead, he argues that GM and State Farm are Alabama residents under a nebulous "sufficiently localized" theory. Not only has Plaintiff provided little explanation of this theory, he also fails to support it with legal authority.

His sufficiently localized argument aside, the Plaintiff argues that State Farm is deemed an Alabama citizen under § 1332(c)(1). Section 1332(c)(1) provides that a corporation shall be deemed a citizen of the state in which it was incorporated and where it has its principal place of business, "except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insured shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business."

The Eleventh Circuit has interpreted § 1332's "direct action" provision as it relates to uninsured motorist policy on several occasions. In *Fortson v. St. Paul Fire and Marine Insurance Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985), the circuit court cited with approval the decision in *Irvin v. Allstate Insurance Co.*, 436 F. Supp. 575, 577 (W.D. Okla. 1977), which found that an action by an insured against his own uninsured motorist insurer was not a direct action under § 1332(c)(1). In *Bowers v. Continental Insurance Co.*, 753 F.2d 1574, 1577 (11th Cir. 1985), the Eleventh Circuit once again cited district court decisions finding that a plaintiff's action against its uninsured motorist insurer are not covered by the direct action provision of § 1332(c)(1). (citing *Adams v. State Farm Mut. Auto. Ins.*

Co., 313 F. Supp. 1349 (N.D. Miss. 1970); *Bishop v. Allstate Ins. Co.*, 313 F. Supp. 875 (W.D. Ark. 1970)).

Most recently in *Broyles v. Bayless*, 878 F.2d 1400, 1404-05 (11th Cir. 1989), the circuit court dealt with an action filed by a plaintiff against the alleged driver tortfeasor and the plaintiff's uninsured motorist insurer. The *Broyles* court noted that it was not faced with a situation where an "insurance company must defend itself against a 'direct action' as that term is used in 28 U.S.C. § 1332(c)." The *Broyles* court also noted that the underlying purpose behind § 1332(c)(1) is to eliminate diversity jurisdiction where a state allows a plaintiff to bring an action directly against the insurer instead of bringing the action against the tortfeasor.[3] Therefore, the court finds the *Broyles* decision to be consistent with prior Eleventh Circuit holdings that actions against uninsured motorist insurers are not direct actions under the terms of § 1332(c)(1).

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[3] While the *Broyles* court ultimately decided that the uninsured motorist carrier's residency was not to be considered for purposes of determining diversity jurisdiction, this determination was based upon the holding that the carrier was not a real party in interest in terms of that particular action. Therefore, the *Broyles* holding is inapplicable to the Plaintiff's § 1332 direct action argument. Even under the *Broyles* real party in interest analysis, the court finds that diversity jurisdiction is present in this action. *See Pierce v. Johnson*, 849 F. Supp. 16, 18 (E.D.N.Y. 1994). State Farm is more likely to exercise "substantial control" over the course of this litigation than did the *Broyles* uninsured motorist insurer since Pierce is no longer a party to this action and any effort on behalf of Pierce must be carried solely by State Farm.

Based upon Eleventh Circuit case law dealing with § 1332(c)(1), the court finds that Plaintiff's action against State Farm in its role as an uninsured motorist insurer is not a direct action. Therefore, the court finds that State Farm's citizenship is not determined by the direct action provision of § 1332(c)(1). Further, the court finds that it has jurisdiction over this matter by virtue of diversity jurisdiction and that the Plaintiff's New Motion is due to be denied.

Accordingly, it is CONSIDERED and ORDERED that the Plaintiff's motion to remand be and the same is hereby DENIED.

DONE this 20th day of May, 1997.

/s/ Ira DeMent
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MAHLON DANIEL BROWDER, JR.	)	
Plaintiff,	)	CIVIL ACTION NO. 96-D-789-N
vs.	)	
TONY R. PIERCE, GENERAL MOTORS CORP., and STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,	)	
Defendants.	)	

ORDER

Before the court is Defendant Tony R. Pierce's ("Pierce") "Motion For Entry of Judgment Pursuant To A Settlement Agreement Of The Parties, Or In The Alternative, Motion To Sever And Remand" ("Motion") filed on January 9, 1997. Plaintiff filed a response to the Motion on January 28, 1997, and Pierce supplemented the Motion on May 19, 1997. In his Motion Pierce requests the court to enter judgment pursuant to a settlement agreement reached between himself and Plaintiff.

In response, Plaintiff argues that no agreement was actually reached between the two parties. Plaintiff argues that the alleged settlement was not binding because Plaintiff's counsel lacked authority to settle the matter. Plaintiff has advanced similar arguments in his previous efforts to deny the existence of a settlement agreement. However, the court rejected these arguments in its June

28, 1996, order denying Plaintiff's motion to remand and in its August 19, 1996, order denying Plaintiff's motion for reconsideration. Based upon its earlier orders, the court finds that this renewed effort to deny the validity of the settlement agreement is due to be denied.

In addition to his request that the court enter judgment pursuant to the settlement agreement, Pierce urges, in the alternative, that the court sever and remand the dispute over the settlement agreement to state court. The court agrees and finds that this dispute is due to be remanded to the Circuit Court of Covington County. This dispute is a contract action which the circuit court is uniquely qualified to handle. Additionally, both Pierce and Plaintiff are Alabama residents meaning that diversity jurisdiction is unavailable in this action. The court also finds that additional fact-finding may be necessary in this matter. Therefore, the court finds that the portion of this action involving Plaintiff and Pierce and their settlement agreement is due to be severed from the remainder of this action and remanded to the Circuit Court of Covington County.

Accordingly, it is **CONSIDERED** and **ORDERED** that Pierce's Motion be and the same is hereby **GRANTED** in part and **DENIED** in part and that the portion of this action involving the settlement agreement between Plaintiff and Pierce is due to be **SEVERED** from the remainder of this action and **REMANDED** to the Circuit Court or Covington County for further proceedings as are appropriate.

DONE this 20th day of May, 1997.

/s/ Ira DeMent
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6155

MAYLON D. BROWDER,

Plaintiff-Appellant,

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19___, _____ F.2d _____).

Before: TJOFLAT, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

28 U.S.C. § 1446(b)

* * *

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

* * *

* * *

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6155

MAHLON DANIEL BROWDER, JR.,

Plaintiff-Appellant,

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF PLAINTIFF-APPELLANT

* * *

ARGUMENT

I. THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION.

This Court should review *de novo* a denial of remand after removal. *Herron v. Continental Airlines, Inc.*, 73 F. 3d 57 (C.A. 5 (Tex.) 1996).

GM filed its Notice of Removal on May 10, 1996, pursuant to 28 USCA § 1446(b), which states in relevant part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. . . .

28 USCA § 1446(b) (West 1997). GM alleged in its notice that the action became removable upon its receipt of a May 1, 1996, letter regarding settlement from Appellant's counsel to counsel for Tony Pierce, the sole nondiverse defendant. (R1-1-Ex. B). Appellant submits the following argument in support of its position that the district court erred as a matter of law in denying remand. (R1-15-1).

A. The Notice of Removal Was Not Timely Filed.

The U.S. District Court for the Middle District of Alabama has held that a settlement agreement entered into prior to appeal does not require the signature of the party to be bound, where the agreement is entered into by the party's attorney. *Spurlock v. Pioneer Financial Services*, 808 F. Supp. 782 (M.D. Ala. 1992). Alabama Code § 34-3-21, which gives an attorney "authority to bind his client . . . by any agreement in relation to such case, made in writing" governs trial level settlements, while Alabama

Rules of Appellate Procedure, Rule 47[1], which specifically requires the signature of the party to be bound, governs settlement agreements during appellate proceedings. *Id.* Applying this rule to the case at issue, it is clear that the settlement agreement between Appellant Browder and former Defendant Pierce is governed by Alabama Code § 34-3-21. Appellee relied heavily upon this statute in defending its Notice of Removal to the district court, arguing that the May 1, 1996, letter from Browder's counsel satisfied the "other paper" removal option in 28 USCA § 1446(b), and thus commenced the thirty day removal period allowed therein. However, this argument must fail. Diverse Defendant State Farm had notice that the case was removable as soon as its attorney, John Peek, received his carbon copy of an April 3, 1996, settlement letter from Todd Derrick, counsel for former nondiverse Defendant Pierce, to James Harvey Tipler, counsel for Appellant Browder. (R1-9-10 (Ex. 1)). That letter stated in relevant part: "We have policy limits of $20,000.00 which we desire to pay on behalf of our insured, Tony R. Pierce." (R1-9-10 (Ex.1)). Thus, the deadline for removal expired thirty days later, or before May 6, 1996[2]. GM filed

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[1] No private agreement or consent between the parties or their attorneys, relating to the proceedings in any cause, shall be alleged or suggested by either against the other, unless the same be in writing, and signed by the party to be bound thereby. . . .

Ala.R.A.P., Rule 47 (West 1997).

[2] Rule 6(e) of both the Federal Rules of Civil Procedure and the Alabama Rules of Civil Procedure require that:

> Whenever a party has the right or is required to do some act or take some proceedings within a

its Notice of Removal, joined by State Farm on May 10, 1996 (R1-1-1), four days after the May 6, 1996, deadline.

1. State Farm had Actual Notice that Appellant Browder's Counsel Offered to Settle with Pierce for Policy Limits on January 6, 1995.

On January 6, 1995, approximately four months prior to filing the original Complaint in Circuit Court, Browder's attorney Frank J. Tipler, Jr., wrote to Mr. Jim Haskins of Progressive Insurance, regarding Browder's claim against its insured, former Defendant Pierce. In that letter, Frank Tipler stated unequivocally, "We will settle for the policy limits." (Appellant's Motion to Supplement the Record on Appeal, Ex. A). On that same day, January 6, 1995, Mr. Tipler wrote to Appellant Browder's UM carrier State Farm Insurance, a former diverse defendant[3] in this litigation, stating:

> We represent Mr. Browder, who was injured and paralyzed in a wreck on September 3, 1994. We feel sure the policy limits on the car will be paid. We ask that you agree that we settle with them [Pierce's insurer] for policy limits. . . .

(Appellant's Motion to Supplement the Record on Appeal, Ex. B). "Where Plaintiff by his voluntary act has definitely indicated his intention to discontinue the action

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> prescribed period after the service of a notice or other paper upon the party and the notice of paper is served upon the party by mail, three days shall be added to the prescribed period.

Fed.R.Civ.P. 6(e); Ala.R.Civ.P. 6(e).

[3] State Farm was dismissed on November 24, 1997.

as to the non-diverse defendant, plaintiff has indicated that he no longer desires to dictate the forum and the case then becomes removable. *Lesher v. Andreozzi*, 647 F. Supp. 920 (M.D Pa. 1986) (citing *Powers v. Chesapeake & O. Ry. Co.*, 169 U.S. 92 (1898)). Frank Tipler, through his "voluntary act" of writing the January 6, 1995, letter, "indicated [Appellant's] intention to discontinue the action as to the non-diverse defendant [Tony Pierce] . . . [and] indicated that he [did not] desire to dictate the forum." *Id.* Since Tipler made an unequivocal offer to settle for policy limits on January 6, 1995, the settlement agreement, according to Alabama Code § 34-3-21, became enforceable as soon as the offer was accepted by Pierce's attorney on April 3, 1996. (R1-9-10 (Ex.1)).

2. State Farm Had Actual Notice That Pierce Accepted Browder's Settlement Offer on April 3, 1996.

State Farm had actual notice of both the January 6, 1995, settlement offer and the April 3, 1996, acceptance. Pierce's attorney, Todd Derrick, sent a carbon copy of the April 3, 1996, letter to State Farm's attorney, John Peek. (R1-9-10 (Ex.1)). Thus, State Farm had "other paper" from which it could ascertain that the case had become removable upon its receipt of the April 3, 1996, letter. State Farm had thirty days from receipt of the letter (or until May 6, 1996), to file a Notice of Removal, and failed to do so.

3. State Farm Failed to File Notice of Removal Within Statutory Thirty Day Period.

Former diverse Defendant State Farm had an opportunity to remove the case to federal court prior to May 6, 1996, and chose not to do so. Former non-diverse Defendant Pierce had an open settlement offer from Appellant upon receipt of Frank Tipler's letter January 6, 1995, which he accepted on April 3, 1996. State Farm had notice of both the offer and acceptance, since according to Alabama code § 34-3-21, both attorneys bound their clients when they communicated the settlement agreement in writing, and since State Farm received both of the pertinent letters, State Farm did not timely file a Notice of Removal.

4. Appellee GM Had to Remove, If at All, by Joining State Farm in a Removal Initiated Within the Thirty Day Period Following Both Parties' Receipt of the April 3, 1996, Acceptance Letter from Pierce's Attorney.

Appellee General Motors did not directly receive a copy of Frank Tipler's offer of policy limits on January 6, 1995. State Farm, however, was the addressee of that communication. (R1-9-10 (Ex.1)). Counsel for both General Motors and State Farm were carbon copy recipients of the April 3, 1996, acceptance letter. (R1-9-10 (Ex.1)). Thus, since GM may have had no notice of the January 6, 1995, offer, its receipt of the April 3, 1996, acceptance letter did not give GM proper notice that the case had become removable.

On the other hand, State Farm received both items of correspondence, the second of which commenced the running of State Farm's thirty day removal period. At that point, State Farm could have filed its own Notice of Removal and requested joinder from GM. However, State Farm did not initiate the removal, but instead waited for GM to do so, after GM's receipt of the May 1, 1996, letter on which GM relied as grounds for removal. (R1-1-Ex. B). So, State Farm joined GM's Notice of Removal on May 10, 1996 (R1-2-1), four days after State Farm's removal period expired. This joinder was not proper under the applicable removal statutes.

The Fifth Circuit Court of Appeals discussed this issue at length in a 1986 case, *Brown v. Demco, Inc.*, 792 F.2d 478, 481-482 (C.A. 5 (La.)1986):

> While the time limitation for removal is not jurisdictional, and therefore, may be waived, failure to petition for removal within thirty days may render removal improvident within the meaning of 28 USC § 1447(c).[4]
>
> In the absence of waiver of the time limit by the plaintiff, or some equitable reason why that

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[4] A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under § 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

28 USCA § 1447 (West 1997).

limit should not be applied, however, a defendant who does not timely assert the right to remove loses that right

. . . .

It is well established that, under 28 USC § 1446(c), all defendants must join in a removal petition.[5] No appellate court has yet decided whether defendants who have waived the right to seek removal directly are also precluded from joining in a removal petition. The general rule, however, is that "[i]f the first served defendant abstains from seeking removal or does not effect a timely removal, subsequently served defendants cannot remove . . . due to the rule of unanimity among defendants which is required for removal."[6] District courts in this circuit have followed this rule.

The rule follows logically from the unanimity requirement, the thirty day time limit, and the fact that a defendant may waive removal by proceeding in state court. Moreover, by restricting removal to instances in which the statue [sic] clearly permits it, the rule is consistent with the trend to limit removal jurisdiction[7] and with the

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[5] *Tri-Cities Newspapers, Inc. v. Tri-Cities Printing, Local 349*, 427 F.2d 325, 326-27 (5th Cir. 1970).

[6] 1A J. Moore, *Moore's Federal Practice*, p. 0.168 [3.5-5], 586-87 (2d ed. 1985). *See also* 14 A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 3732 at 531-32.

[7] C. Wright, The Law of Federal Courts, § 38, 219 (4th ed. 1983).

> axiom that the removal statues [sic] are to be strictly construed against removal.[8]
>
> The general rule has been criticized as unfair. Wright, Miller, & Cooper, for example, point out that it deprives defendants served after the thirty-day period "of the opportunity to persuade the first defendant to join in the removal petition."[9] This criticism is apparently the sole authority supporting the "equitable" approach the trial court followed in denying removal. We do not find it persuasive. None of the decisions cited by Wright, Miller, & Cooper actually followed what they call an equitable approach: on the contrary, each cited case followed the general rule. *More important, we do not perceive the suggested unfairness to the subsequently added defendant who is merely not granted an opportunity that might have been available to others. A defendant who is added to a case in which a co-defendant has failed to seek removal is in no worse position than it would have been in if the co-defendant had opposed removal or were domiciled in the same state as the plaintiff.*

Id. (footnotes in original) (emphasis added).

Two years later, the Fifth Circuit refined its *Brown* ruling in *Getty Oil Corp. v. Insurance Co. of North America*, C.A. 5 (Tex.)1988):

> [A] remaining issue is whether § 1446(b) requires that all then served defendants join in the removal petition within thirty days of service on the first defendant. [Appellant] is correct

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[8] Butler v. Polk, 592 F.2d 1293, 1296 (5th Cir. 1979).

[9] 14 A C. Wright, A. Miller & E. Cooper, *supra* note 11 at 532.

> in asserting that all defendants who are properly joined and served must join in the removal petition, see *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986), and that failure to do so renders the petition defective. See *Harris v. Edward Hyman Co.*, 664 F.2d 943, 944 & n. 3 (5th Cir. 1981). The record in the present case, however, indicates that all the defendants did eventually join in the removal petition. [Defendant A] joined within thirty days after it was served, but fifty-one days after [Defendant B] was served. The specific question is whether the provisions of § 1446(b) allow [Defendant A], a then served defendant, to join in the original removal petition more than thirty days after [Defendant B] was served.
>
> The provisions of § 1446(b) make it clear that a petition for removal must be filed within thirty days after service of summons upon the defendant. *In cases involving the multiple defendants, the thirty-day period begins to run as soon as the first defendant is served, (provided the case is then removable).* See Brown, 792 F.2d at 481; 1A *Moore's Federal Practice* p. 0.168 [3.-5-5] at 586 (1987). *It follows that since all served defendants must join in the petition, and since the petition must be submitted within thirty days of service on the first defendant, all served defendants must join in the petition no later than thirty days from the day on which the first defendant was served.*

Id. (emphasis added). Appellant has found no case law distinguishing from this rule the present situation, in which the receipt of "other paper", rather than the filing of the complaint, begins the thirty day removal period. Appellant asserts that the same reasoning applies equally to the case at hand. Thus, Appellee General Motors was

also barred from removing the matter to federal court after the initial thirty day removal period applicable to State Farm.

B. Removal Statutes are to be Strictly Construed Against Removal and in Favor of Remand.

"[R]emoval statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand." *Boyer v. Snap-on Tools Corp.*, 913 F. 2d 108, 111 (3rd. Cir. 1990) (quoting *Steel Valley Auth. v. Union Switch and Signal Div.*, 809 F. 2d 1006, 1010 (3rd Cir. 1987), *cert. dismissed*, 484 U.S. 1021 (1988)), *cert. denied*, 498 U.S. 1085 (1991); *See also Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S 100, 108-09 (1941). *Libhart v. Santa Monica Dairy Co.*, 592 F. 2d 1062 (2d Cir. 1979); *Wilson v. United States Dept of Ag*, 584 F. 2d 137, 142 (6th Cir. 1978). After strictly construing the removal statutes pertinent to the case at issue, this Court should remand the entire matter to the Circuit Court for Covington County, Alabama. Remand, if granted, will moot the other issues in this appeal.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6155

MAHLON DANIEL BROWDER, JR.,

Plaintiff-Appellant,

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

REPLY BRIEF OF PLAINTIFF-APPELLANT

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* * *

ARGUMENT AND CITATION OF AUTHORITIES

I. Remand is Proper Since Removal Clock Began Ticking April 3, 1996.

GM asserts in its brief that Browder has pled inconsistent grounds for remand.[1] Alternative pleading is permitted under FRCP 8(e)(2), and is particularly appropriate where, as here, both grounds were raised and thus preserved in the original Motion to Remand. (R1-3). This matter was improperly removed from state to federal court either because there was no settlement at the

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[1] Appellee's Brief at p. 19.

time of removal or because the settlement was completed more than thirty days prior to GM filing its Notice of Removal. A pleading is not made insufficient by inconsistency of one or more alternative statements if one statement would be sufficient if made independently. *Merchant v. Davies, 244 F. 2d 347 (C.A.D.C. 1957).*

The question of when the settlement actually occurred can be answered only by interpreting the "other paper"[2] exchanged among the parties prior to settlement and by applying state law which is not entirely clear on this point.[3] Browder's original position was that the parties never reached settlement. However, upon discovering the 1995 correspondence between the parties which establishes the foundation for the alternative argument that settlement was finalized on April 3, 1996[4], Browder pursued the procedural defect issue which was properly raised, though not thoroughly argued in its initial Motion to Remand. (R1-13). Now, the issue of procedural defect, having been timely raised in the lower court proceedings and thoroughly detailed in Appellant's Brief, is properly before this Court.

Furthermore, GM's argument that "Alabama law applicable to underinsured motorist claims confirms that it would be totally illogical for Browder to have settled his claim against Pierce prior to State Farm's acquiescence in the settlement,"[5] is without merit. Frank J. Tipler,

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[2] 28 U.S.C. § 1446(b)

[3] Alabama Code § 34-3-21; Ala. R.A.P., Rule 47

[4] See Appellant's Brief at pp. 8-14.

[5] Appellee's Brief at p. 23.

Jr., former counsel of record for Browder, wrote to State Farm, the UM carrier on January 6, 1995, stating,

> We represent Mr. Browder, who was injured and paralyzed in a wreck on September 3, 1994. We feel sure the policy limits on the car will be paid. We ask that you agree that we settle with them for policy limits, that you will not pursue subrogation; and that you will pay your limits for the underinsured motorist portion of your policy.[6]

This letter gave State Farm "adequate notice . . . of proposed settlement and of terms of release"[7] to preserve Browder's right to recover UIM [sic] benefits and fulfilled all of the requirements stated in *Lambert v. State Farm, 576 So. 2d 160, 167 (Ala. 1991).* In addition, refusal or objection by State Farm to the terms of any policy limits settlement would have been unreasonable and would have resulted in an effective waiver of its subrogation rights, given State Farm's awareness throughout this litigation that Browder's injuries were severe, permanent and disabling, and given that State Farm had since January of 1995 to conduct its investigation of the claim. *See id.*

* * *

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[6] See Appellant's Motion to Supplement the Record on Appeal, Ex. A.

[7] *Allstate Ins. Co. v. Beavers, 611 So. 2d 348, 353 (Ala. 1992).*

(2)

Supreme Court, U.S.
FILED
APR 28 1999
CLERK

No. 98-1569

In The

Supreme Court of the United States

October Term, 1998

MAYLON D. BROWDER, JR.,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES KNOX PEDEN, III
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QUESTION PRESENTED FOR REVIEW

Whether a predicate exists either in the record of this case or in the rulings of the court below for the removal/remand "first-served defendant" issue framed by Petitioner, the sole issue raised by Petitioner and one which is not essential to disposition of Petitioner's claim.

PARTIES TO PROCEEDINGS

Petitioner: Mahlon D. Browder[1]

Respondent: General Motors Corporation

RULE 29.6 LISTING

General Motors Corporation has no parent company. Separately provided to the Clerk of the Court, because of it's length and confidential nature, is a list of all General Motors Corporation subsidiaries, joint ventures, and affiliates, both foreign and domestic, not wholly owned by General Motors Corporation, as of March 29, 1999.

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[1] Maylon D. Browder's name is so spelled in the caption of his Petition and in the caption of the orders of the court of appeals. His name is spelled "Mahlon" in the record and in the remainder of this Brief.

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STATEMENT OF THE CASE

Mahlon Browder's Petition stems from the removal of his case by Respondent General Motors Corporation ("GM") to the U.S. District Court for the Middle District of Alabama. The case was eventually decided upon summary judgment in favor of GM rendered by the district court and affirmed by the Court of Appeals for the Eleventh Circuit. (Pet. App. 1, 21.) Browder does not seek review of the merits of that decision, but attacks the district court's jurisdiction by questioning the timeliness of the removal. GM disagrees with Browder's Statement of the Case.

On May 11, 1995, after being injured in a single vehicle accident, Browder, a citizen of Alabama, filed suit in Alabama state court against GM, a Delaware corporation having its principal place of business in Michigan, State Farm Mutual Automobile Insurance Company ("State Farm"), a Delaware corporation having its principal place of business in Illinois, and Tony Pierce, a citizen of Alabama. (R1-1.) Pierce, the driver of a 1994 Chevrolet Blazer which belonged to Browder, was the sole resident defendant. (R1-1.) Browder, the front seat passenger in the vehicle, asserted an underinsured motorist claim under his own insurance policy with State Farm, a products liability claim against GM, and a negligence claim against Pierce. (R1-1.)

On May 10, 1996, GM removed the action to the United States District Court for the Middle District of Alabama, pursuant to 28 U.S.C. § 1441(a) and the "other paper" provision of 28 U.S.C. § 1446(b), based upon Browder's settlement with Pierce and Browder's evident

intent to discontinue the action against Pierce. (R1-1.) In support of removal, GM submitted an April 3, 1996, letter from Pierce's counsel making an offer to settle for Pierce's liability insurance policy limits, and a May 1, 1996, letter from Browder's counsel accepting the policy limits settlement and acknowledging that "this settlement is concluded." (R1-9-Ex. 1; R1-9-Ex. 4.) A description of the settlement correspondence considered in the district court is attached hereto as Appendix 1. Upon Pierce's absence through settlement, the United States District Court had original jurisdiction over this action under 28 U.S.C. § 1332(a) as the amount in controversy exceeded $50,000.00 (the then minimum jurisdictional amount), exclusive of interest and costs.

Browder moved to remand the action, claiming that no settlement had been reached. (Pet. App. 3-7.) The district court found that the action had become removable pursuant to 28 U.S.C. § 1446, and denied Browder's initial motion to remand. (Pet. App. 8, 9.) A motion to reconsider (Pet. App. 10, 11), in which Browder again denied any existence of the settlement, was also denied. (R1-18; R1-20.)

Pierce later filed a Motion for Entry of Judgment in the district court based upon the settlement. (R1-21.) In opposition, Browder filed his third and fourth motions to remand the action, once again denying the existence of any settlement by, in part, asserting that his counsel did not have authority to settle his claims. (R1-24; R2-30.) While confirming his earlier rejection of Browder's arguments that no settlement existed, the district court severed the dispute between Browder and Pierce over the settlement agreement, and remanded that question to the

state court for determination.[2] (Pet. App. 18-20.) The court then denied Browder's third and fourth motions to remand. (R2-43.)

Summary Judgment was granted in favor of GM against all of Browder's claims on January 27, 1998 (R6-129.) Browder appealed to the United States Court of Appeals for the Eleventh Circuit. On appeal, Browder abandoned his claim that no settlement was reached. Rather, based on a January 6, 1995, letter from Browder's counsel to Pierce's counsel demanding policy limits, Browder argued for the first time that GM's removal was untimely. Browder argued that if a settlement had actually occurred, it occurred with acceptance of his "1995 offer" on April 3, 1996, more than 30 days before removal. The 1995 letter was not, however, submitted to the district court and was not a part of the record on appeal.

On appeal, Browder sought to supplement the appellate record with the 1995 letter. On July 27, 1998, the Eleventh Circuit denied Browder's motion to add this extraneous item to the record. (Resp. App., *infra* 2.) On October 23, 1998, the Eleventh Circuit denied Browder's motion to have the Court reconsider its July 27, 1998 Order. (Resp. App., *infra* 3.) On the latter date, the appellate court affirmed the district court's judgment without an opinion (Pet. App. 1). The appellate court later denied rehearing. (Pet. App. 21.)

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[2] Petitioner and Respondent both acknowledged in briefing to the Court of Appeals that the state court subsequently found that an enforceable settlement agreement had been reached.

A. Petitioner Misrepresents the Factual Record Before the District and Appellate Court.

The January 6, 1995, letter on which Browder relies is outside of the record. As earlier noted, GM removed based upon Pierce's April 3, 1996, written offer to settle, and Browder's May 1, 1996, written acceptance of that offer. In contending that GM's removal was untimely, Browder argues that Pierce's April 3 letter was, in fact, an acceptance of *"Petitioner's earlier offer to settle* for Pierce's policy limits." (Petition, p. 3) (emphasis added). Browder again refers, on p. 11 of his Petition, to a "prior offer to settle." Browder's argument in the Court of Appeals makes clear that the "prior offer to settle" to which he refers is the January 6, 1995, letter, which is outside the record. (Pet. App. 27, 28.) No "earlier offer to settle" exists in the record. Browder does not challenge the Eleventh Circuit's denial of his motion to supplement the record with the 1995 letter, and fails to inform this Court that the letter is outside the record.

B. The Petitioner Misrepresents the Settlement Negotiations Leading to Diversity Jurisdiction.

Browder mischaracterizes the record when he claims that on April 3, 1996, Pierce accepted Browder's "earlier offer to settle." Browder goes further astray in failing to acknowledge that he sent an April 9, 1996, letter to Pierce responding to the April 3rd letter which reads " . . . if and when we are granted permission to settle, we *intend to accept your offer.*" (R.1-12-Ex. D) (emphasis added).

Browder also fails to point out that on May 1, 1996, he again wrote Pierce's attorney, for the first time confirming the settlement by stating, "permission is granted to settle," and "this settlement is concluded." (R1-9-Ex. 3.) It is this May 1, 1996, letter which consummated a settlement between Browder and Pierce, the non-diverse defendant, and created diversity jurisdiction giving rise to GM's removal. The record makes clear in Browder's own words, that he considered the April 3rd letter from Pierce an "offer to settle" and not an "acceptance of a prior offer."

C. The Petitioner Fails to Identify GM as a Recipient of the April 3, 1996 Letter.

Browder asks this Court to address inconsistencies in the application of the "first-served defendant" rule. Browder deems State Farm a "first-served defendant" because it received a copy of Pierce's April 3, 1996, letter. What he fails to acknowledge is that Pierce also sent a copy of the letter to GM in the same manner and at the same time. (R1-9-Ex. 1.) Thus, even if the April 3 letter were a diversity triggering "other paper," the "first-served defendant" rule would have no application because both defendants were concurrently served.

REASONS FOR DENYING WRIT

Browder asked this Court to consider a rule which begins a subsequently served defendant's removal clock at the time the first defendant is served. The "first-served defendant" rule, if that is a rule, has no application to this

case. It does not apply to the facts in the record. It does not apply to alter the factual determinations made by the district court and the Eleventh Circuit Court of Appeals. It does not even apply under Browder's representation of the record to this Court.

Petitioner asks this Court to resolve allegedly conflicting decisions on an issue which has no application to this case. The record regarding removal consists of Pierce's April 3, 1996, offer letter to Browder (with copies to State Farm and GM) (R1-9-Ex. 1), Browder's April 9, 1996, letter expressing a conditional intent to accept the offer at a future date (R1-12-Ex. D), State Farm's April 26, 1996, letter waiving its subrogation rights (R1-9-Ex. 3), Browder's May 1, 1996, letter stating "this settlement is concluded" (R1-9-Ex. 4), and GM's May 10, 1996 removal (R1-1). No offer by Browder to be "accepted" on April 3, 1996, by Pierce exists in the record. Rather, the record establishes that the May 1, 1996, letter from Browder to Pierce "concluded" the settlement, giving GM the right to remove. Removal is triggered when Plaintiff "by his voluntary act has definitely indicated his intention to discontinue the action as to the non-diverse defendant." *Lesher v. Andreozzi*, 647 F. Supp. 920, 922 (M.D. Pa. 1986) (citing *Powers v. Chesapeake & O. Ry. Co.*, 169 U.S. 92 (1898)). GM then removed on May 10, 1996, within 30 days of settlement. (R1-1.) Under the facts, the "first-served defendant" rule has no application.

Browder does not ask this Court to disregard the district court's implied factual findings leading to the conclusion that a settlement with Pierce had been made, and that GM's removal was proper, or to reverse those

factual findings. Necessary to the judgments of the district court and the Eleventh Circuit was the determination that Pierce's April 3, 1996, letter did not consummate a settlement and did not create the right to remove. Rather, the courts determined that Browder gave notice that he was abandoning his claim against non-diverse defendant Pierce through settlement on May 1, 1996, when Browder's counsel wrote Pierce to accept Pierce's offer of April 3, 1996. As no enforceable settlement existed prior to May 1, 1996, no party had the right to remove before this date. GM removed this case within 30 days of May 1, 1996, the date Browder accepted Pierce's April 3, 1996 offer. GM's removal was timely.

The courts below determined Browder's May 1, 1996, letter accepting Pierce's settlement offer of April 3, 1996, created diversity jurisdiction, and started the removal clock ticking. This Court is presented with no request or reason to disturb those factual determinations. For the Petition to be granted, this Court would have to disregard both lower courts' factual determinations. This Court is a court of law rather than a court for correction of errors in fact finding. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 276 (1949); *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Supreme Court does not grant certiorari to review evidence and discuss factual findings). This Court does not undertake to review concurrent findings by the district court and the court of appeals in the absence of a very obvious and exceptional showing of error. *Graver Tank*, 336 U.S. at 276. Where the ultimate facts are subject to the "clearly erroneous" rule, and their review would be of no importance save to the litigants themselves, the Petition for Certiorari should be

denied. *See Rudolph v. United States*, 370 U.S. 269, 279 (1962).

Even under Petitioner's version of the facts, the "first-served defendant" rule has no application. First, even if the January 6, 1995, letter were of record, its admission would not render the factual findings of the district court and court of appeals clearly erroneous and create an exceptional showing of error. Based on Browder's own correspondence of April 9, 1996, and May 1, 1996, Browder considered the April 3, 1996, letter from Pierce as an "offer," and not a conclusion of settlement. Second, Petitioner fails to note that GM and State Farm were both sent the April 3, 1996, letter in the same manner and at the same time (by carbon copy service upon their trial counsel). There is no record as to whom actually "received" the letter first, State Farm or GM. In fact, the record does not establish when either State Farm or GM received the April 3, 1996 letter, or that such receipt was more than 30 days before removal.

If the April 3, 1996, letter were an "other paper" giving notice of the right to remove, the record does not show that one defendant as opposed to the other was "first-served" with this notice. As such, the record does not present the "first-served defendant" issue raised by Browder to pique the Court's interest. This Court is simply not presented here with a case which asks the question, "If one defendant is served a removable state court petition before the other defendants, does that start the 30-day removal clock ticking for all defendants?" Nor is the Court presented with a case which asks, "If one defendant receives notice before the other defendants of a settlement with the only non-diverse defendant, does that

start the removal clock ticking for all defendants?" This case, even under Browder's view, presents a factual scenario which does not raise the question Browder presents.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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DATE	DOCUMENT
April 3, 1996	Pierce's attorney writes Browder's attorney offering the $20,000.00 policy limits. Pierce's attorney requests that, prior to settlement, Browder provide assurances regarding potential outstanding medical liens. Copies provided to counsel for GM and State Farm. (R1-9-Ex. 1.)
April 9, 1996	Browder's attorney responds to Pierce's attorney with copy to State Farm indicating "if and when we are granted permission to settle by [State Farm], we intend to accept your offer," and "I would request that [State Farm] give this a look, so . . . settlement can take place . . . " (R1-12-Ex.D.)
April 26, 1996	Counsel for State Farm writes to both Browder's and Pierce's attorneys advising that State Farm waives its right to subrogation and "is thereby agreeing to allow Mr. Pierce's insurer to settle with [Browder] for its policy limits." (R1-9-Ex.3.)
May 1, 1996	Browder's attorney writes Pierce's attorney, enclosing the April 26, 1996, letter, and in light of the waiver by State Farm, acknowledges "permission is granted to settle" and that "this settlement is concluded". (R1-9-Ex.4.)
May 10, 1996	GM removes the action to the United States District Court for the Middle District of Alabama. (R1-1).

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6155

MAYLON D. BROWDER,

Plaintiff-Appellant,

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Alabama

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(Filed July 27, 1998)

ORDER:

Appellant's motion to supplement the record on appeal is DENIED.

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6155

MAYLON D. BROWDER,

Plaintiff-Appellant,

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Alabama

(Filed Oct. 23, 1998)

Before TJOFLAT, BLACK and MARCUS, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of this Court's order of July 27, 1998, is DENIED.